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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 24

ALGERNON S. SCHAFER, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 25

EDWARD SCHAFER, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 26

LEONARD SCHAFER, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia (R. 82–88)

is reported in 83 F. (2d) 317. The opinion of the Board of Tax Appeals is reported (R. 34–39) in 32 B. T. A. 289.

JURISDICTION

The judgments of the Court of Appeals were entered on March 2, 1936 (R. 88–90). The petition for writs of certiorari was filed April 6, 1936, and was granted on May 18, 1936. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether petitioners' firm was entitled under Section 22 (c) of the Revenue Act of 1928 to use inventories in determining gains or losses from its transactions in certain securities.

2. Whether the brokerage firm of Schafer Brothers was a dealer in securities within the meaning of Article 105 of Treasury Regulations 74 in the calendar year 1929.

3. Whether respondent is estopped retroactively to change a ruling of the Committee on Appeals and Review so as to deny petitioners' firm the use of inventories which it had under the former ruling.[1]

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[1] This question was not presented in the petition for certiorari, or in the specification of errors to be urged as set out therein. We believe, therefore, that it is not properly before the Court (see p. 20, *infra*). Nevertheless we discuss it on its merits.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved will be found in the Appendix, *infra,* pp. 23–24.

STATEMENT

The facts as found by the Board of Tax Appeals (R. 32–34) may, so far as material, be summarized as follows:

During the taxable year 1929, and for many years prior thereto, petitioners, under the firm name of Schafer Bros., conducted a general brokerage business with offices at 120 Broadway, New York City. The firm had been for many years a member of the New York Stock Exchange. Petitioner Leonard Schafer owned a seat on the Exchange, and was the floor member of the firm, and Algernon and Edward were the office members. Leonard was also a specialist in one or two stock issues. All three were active. (R. 32.)

Schafer Bros. was a dealer and merchant in securities on commission and on margin, and in that capacity executed orders for the purchase or sale of securities on any exchange where the particular securities were listed. From 1925 to 1929 the partnership also participated in a large number of syndicate and underwriting operations. (R. 33.)

As a part of its business activities, but with no relation to its customers' accounts or orders, the partnership has always, to some extent, bought and sold securities for its own account. Beginning in

1925 or 1926, however, and continuing through 1929, such trading became more extensive. It was conducted through orders executed by Leonard Schafer or other brokers, and had no relation to or connection with the accounts of the partnership's customers. The securities were purchased in expectation of a rise in the market price and for the purpose of resale to any buyer at a profit for the partnership's own account. They were not purchased for investment. (R. 33.)

Sales of these securities were made through orders given Leonard Schafer or other brokers, and the identity of the purchasers was not known. The purchases and sales were entered in the "Error Account" (the name having no significance). During 1929 entries in the Error Account showed purchases of 107,500 shares and sales of 92,500 shares of 72 different issues of securities. The number of such securities carried at the close of 1929 was unusually large, due to the change in the market and the consequent inability to sell at a profit. All but a comparatively few shares, however, were sold during 1930. (R. 33.)

In 1923 the New York Stock Exchange made a rule requiring its members to inventory securities for the purpose of certain Exchange questionnaires. Prior to 1925 this partnership had carried its own securities in the Error Account (as distinguished from those carried for customers' accounts) at cost, but beginning with that year and

including 1929, it inventoried them at their fair market value both at the beginning and end of the year. The change was made as a matter of business policy, but with knowledge of the effect of the taxing statutes. (R. 33–34.)

The Commissioner determined that the partnership was not a dealer in securities with respect to those carried in the Error Account, and that they must be carried at cost. Accordingly, he disallowed the use of inventories and increased the partnership's income by $511,667, the difference between the cost over the market value at the beginning and the end of the year. (R. 34.)

The Board of Tax Appeals concluded that as to this branch of the partnership's business it was a speculator and not a dealer in securities within the meaning of the regulations, and approved the deficiencies found by the Commissioner (R. 34–39). The Court of Appeals sustained the Board's decisions (R. 88–90).

SUMMARY OF ARGUMENT

I

The Revenue Acts are concerned primarily with realized gains and losses. The provision which allows the use of inventories in exceptional cases is not designed for the relief of the taxpayer; rather it is designed to authorize the Commissioner to require inventories where necessary correctly to reflect income. This is clearly shown by the legis-

lative history of the section. Consequently, the statute itself does not authorize petitioners to use inventories unless they are within the regulations of the Commissioner.

II

Nor is petitioners' firm a merchant or dealer in securities under the Regulations. The term "dealer", as used in Article 105, contemplates one who keeps a stock of securities on hand for sale to customers, buys to replenish that stock, has customers and relations with the general public. Petitioners' firm does not meet the prerequisites of Article 105, for the record reveals that it merely purchased securities from brokers for resale through brokers at a profit upon an expected rise in the market. The cases dealing with specialists, even if correctly decided, which is not admitted, do not support petitioners' contention, for specialists have functions and relationships with others that petitioners in the present case do not have.

III

Respondent is not now estopped from challenging the use of inventories by petitioners because of the prior practice of the Bureau or its expressed views on the subject. The factual basis for petitioners' argument is weak, but in any event the Commissioner may change his views. Reenactment of the statute without change since the ruling

is not material, for that is persuasive only if the rulings are Treasury Regulations or Treasury Decisions, which the ruling upon which petitioners rely is not.

ARGUMENT

I

PETITIONERS WERE NOT AUTHORIZED BY THE STATUTE TO USE INVENTORIES

The Revenue Acts are concerned primarily with realized gains and losses. *Weiss* v. *Wiener,* 279 U. S. 333, 335; *Lucas* v. *American Code Co.,* 280 U. S. 445, 449. Nevertheless, the Acts have consistently recognized that in certain types of business it is proper to make an exception to the general rule and to use inventories to determine annual gain or loss. See *Hamill* v. *Commissioner,* 30 B. T. A. 955, 958. Section 22 (c) of the Revenue Act of 1928 (*infra,* p. 23) accordingly provides that the taxpayer shall take inventories "Whenever in the opinion of the Commissioner the use of inventories is necessary in order clearly to determine the income of any taxpayer."

Petitioners' first point is that this statute itself, apart from the regulations promulgated under it, entitles them to the use of inventories, in accordance with the best accounting practice in the trade or business (Br. pp. 7–10). The legislative history of the inventory provision shows clearly, however, that the legislation was not designed for the relief

of taxpayers, but was intended as a grant of power to the Commissioner to require returns which would clearly reflect income.

The inventory provision had its origin in Section 203 of the Revenue Act of 1918 (c. 18, 40 Stat. 1057). The section appears in the Conference Print of the 1918 Revenue Bill with the Senate additions and deletions indicated by italics and stricken-through type as follows:

INVENTORIES

SEC. (22) ~~202~~ 203. That whenever in the opinion of the Commissioner the use of inventories is necessary in order clearly to determine the income of any taxpayer, inventories shall be taken by such taxpayer upon such basis as the Commissioner, with the approval of the Secretary, may (23) ~~approve or~~ prescribe (24) *as conforming as nearly as may be to the best accounting practice in the trade or business and* as most clearly reflecting the income (25) ~~of the taxpayer~~

The elimination of the word "approve", contained in the House bill, indicates a studied avoidance of a grant of authority to the Commissioner to approve any basis which the taxpayer might choose. The obvious purpose of Congress was to limit the application of the section to cases where the Commissioner considered it necessary to require the use of inventories properly to reflect income. See H. Rept. 767, 65th Cong., 2d sess., p. 4; *Thomas Shoe*

Co. v. *Commissioner,* 1 B. T. A. 124; *Fried* v. *Commissioner,* 31 B. T. A. 638, 640, reversed, 83 F. (2d) 193 (C. C. A. 2d), pending on petition for writs of certiorari, Nos. 186 and 187, October Term, 1936.

II

PETITIONERS WERE NOT DEALERS OR MERCHANTS IN SECURITIES WITHIN THE MEANING OF ARTICLE 105 OF REGULATIONS 74

Petitioners' second contention is that even though the statute itself, apart from the regulations, does not allow them the use of inventories in respect of the transactions here in question, nevertheless they are, as to those transactions, within the purview of the term "dealer" as used in Regulations 74, Article 105 (*infra,* pp. 23–24). On the contrary, we believe that with respect to these transactions, entered into by the firm on its own account, petitioners were acting not as dealers or merchants but as speculators.

Under Section 22 (c) the Commissioner is vested with very broad discretion as to when inventories may be used. *Seeley* v. *Helvering,* 77 F. (2d) 323 (C. C. A. 2d). In the exercise of that discretion the Commissioner has announced by regulation that inventories are necessary in every business where the production, purchase, or sale of *merchandise* is an income-producing factor. Regulation 74, Article 101 (*infra,* p. 23). The difficulty of ascertaining the cost of goods sold in a manufacturing or merchandising business of any

magnitude is readily apparent, and there can be no doubt that the Commissioner's insistence upon inventories in such cases is proper. Hence there is no doubt that the regulations apply to any business in which merchandise is stocked and kept on hand for sale in the regular course of a manufacturing or merchandising business.

The term "merchandising" at once suggests numerous commercial activities, and the Government does not contend that its scope is confined within narrow limits. Without doubt, there are banks and commercial houses who purchase securities and keep them on hand for sale in a manner not unlike the stocks of merchandise maintained by the hardware merchant, the butcher, or the grocer. See *Harriman National Bank* v. *Commissioner,* 43 F. (2d) 950 (C. C. A. 2d). It was in recognition of this situation that the Commissioner promulgated Article 105 of Regulations 74, authorizing merchants in securities to make their returns upon the inventory basis. It was recognized that such a regulation might be open to abuse and that taxpayers who occupied no relationship to the general public requiring them to keep a stock of securities on hand would claim the privilege of being included in the category of merchants. Accordingly the regulation not only described the class of taxpayers who should use inventories but specifically excluded from its application certain taxpayers who might be thought to

fall within the definition but were in fact excepted therefrom. To this end Article 105 provides:

> Taxpayers who buy and sell or hold securities for investment or speculation and not in the course of an established business, and officers of corporations and members of partnerships who in their individual capacities buy and sell securities, are not dealers in securities within the meaning of this rule.

Securities are purchased by various classes of people with no other purpose than their future sale at a profit upon an expected or hoped for rise of the market. There would probably be no dissent from the statement that the term merchant does not apply to them. Such transactions are not those of a merchant, even if they constitute the exclusive business of an individual, a firm, or a corporation. *Adirondack Securities Corp.* v. *Commissioner,* 23 B. T. A. 61, 64; *Northeastern Surety Co.* v. *Commissioner,* 29 B. T. A. 297, 298, 299; *Donander Co.* v. *Commissioner,* 29 B. T. A. 312, 314; *Oil Shares, Inc.* v. *Commissioner,* 29 B. T. A. 664, 669, 670. *A fortiori,* they are not if they constitute merely a sideline. Such traders occupy no relationship to others which puts them in a class with the merchant. They have no customers to serve. No one expects them to have a stock of securities on hand to meet a demand that might be made upon them in the regular course of their business. They do not buy at wholesale and do not depend for their

profit upon the difference between wholesale and retail prices. For this they depend solely upon the fluctuations of the market. They are speculators or investors, not dealers or merchants.

We submit that an analysis of the facts relating to petitioners' business will disclose that with regard to the transactions here involved they were not dealers within the terms of the Regulations. The findings of the Board were (R. 33) that "as a part of its business activities, but with no relation to its customers' accounts nor to the execution of orders for its customers", the firm bought and sold securities for its own account, entering the transactions in a separate account called the "Error Account" (the name having no significance). The trading was conducted through orders executed by petitioner Leonard Schafer or other brokers, and the securities "were purchased in expectation of a rise in the market price and for the purpose of resale, to any buyer, at a profit for the partnership's own account." Sales of those securities were made through orders given Leonard Schafer or other brokers, and the identity of the purchasers was not known. These findings were expressly approved by the Court of Appeals (R. 85–86).

In Point II of their brief (p. 11) petitioners make a detailed analysis of Article 105 of the Regulations, which discloses certain prerequisites to classification as a dealer in securities, and assert (p. 12) that they have "complied with all the foregoing prerequisites." We submit that the find-

ings of the Board as outlined above do not support the assertion.

Adopting petitioners' analysis, the most important prerequisites to classification as a dealer are Nos. 4, 6, and 7, as follows:

> (4) * * * a dealer in securities is a merchant of securities, whether an individual, partnership or corporation * * *.
>
> (6) * * * regularly engaged in the purchase of securities and their resale to customers * * *.
>
> (7) * * * that is, one who as a merchant buys securities and sells them to customers with a view to the gains and profits that may be derived therefrom * * *.

The Regulations, in other words, contemplate a purchase of securities as a stock in trade and replenishment from time to time with additional purchases in order to maintain a supply sufficient to meet the demands which might be expected from customers. This petitioners' firm did not do. There were no customers dependent upon petitioner for their source of supply. With respect to these securities petitioners occupied no relationship with the general public which justified or required them to prepare for and serve an anticipated demand. The transactions were wholly independent of the general brokerage business conducted by the firm, and were in no way designed to enable the firm to meet the demands of the customers with which it dealt in other aspects of its

business. There is no more reason for allowing petitioners a loss upon so much of these securities as they still held at the close of the taxable year than there is for allowing similar losses to every purchaser who found himself in possession of securities which had depreciated in value as a result of the 1929 debacle. Certainly, if the market had risen instead of having dropped there would have been no justification for taxing the vast army of speculators on unrealized gains. Similarly, there is, we submit, no occasion here to permit deductions upon unrealized losses.[2]

A brief comment should be made on some of the other prerequisities. The first is as follows:

> (1) * * * a description of the method employed shall be included in or attached to the return * * *.

It is conceded that this requirement has not been met (Br., p. 12). While it may be true that this requirement should not be fatal to a taxpayer's contention if all the other requirements have been met (see *Commissioner* v. *Stevens*, 78 F. (2d) 713 (C. C. A. 2d); *Vaughan* v. *Commissioner* (C. C. A. 2d), decided August 10, 1936, reported in Prentice

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[2] It is true that the Board found (R. 33) that "the partnership was a dealer and merchant of securities on commission and on margin." The exact nature of this business is not disclosed by the record. However, that phase of the firm's activity is not that which is involved in the present action, which concerns only the securities bought for the firm's account, and carried in its "Error Account."

Hall, Federal Tax Service (1936), Vol. 1, par. 1509, where, as here, there has been no substantial compliance with the regulation, the failure may well be fatal to petitioners' contentions.

The ninth requirement, as set forth by petitioners, states:

> (9) Taxpayers who buy and sell or hold securities for investment or speculation and not in the course of an established business, and officers of corporations and members of partnerships who in their individual capacities buy and sell securities, are not dealers in securities within the meaning of this rule.

Petitioners argue (Br. 20–21) from this language that if an established business is proved, the element of speculation becomes immaterial. That is, they interpret the sentence as if it read: "Taxpayers who buy and sell or hold securities for investment, or speculation not in the course of an established business, are not dealers." Even if we were to assume, *arguendo,* that such was the proper interpretation, petitioners would not benefit. Certainly, the regulation does not sanction the use of inventories in connection with speculation in securities merely because the taxpayer has some kind of an established business. The dealings in the Error Account here involved were found by both the Board and the court below to be wholly separate from the established business of petitioners' firm, that of a broker (R. 33, 83). In view of this express finding, petitioners' insistence that they

were an integral part of the business because they had been indulged in for many years (Br. 18–19) is not persuasive. Moreover, we do not believe that this sentence of Article 105 is to be interpreted in the manner suggested by the petitioners. To do so would be to make it inconsistent with the intent of all that precedes it. The sentence may be ineptly phrased, but we submit that it is simply intended to prevent any interpretation of the regulations which would include investors or speculators. See *Seeley* v. *Helvering,* 77 F. (2d) 323, 324 (C. C. A. 2d).

The contention that the partnership must be held to be a dealer and allowed to establish a loss by the inventory method, rather than by sale, because it might have been established had the stocks been sold (Br. 22, 24), is naive. It can hardly be claimed that a taxpayer must be allowed to take a loss without a sale because he is allowed to take a loss with a sale. Under a system of taxation which contemplates realized gains and realized losses, it cannot be admitted that the sale is superfluous.

Petitioners' contention (Br. 24) that the rules of the Stock Exchange, which require him to keep inventories for certain purposes, should control here requires little comment. In *Old Colony R. Co.* v. *Commissioner,* 284 U. S. 552, 562, and *Kansas City Southern Ry. Co.* v. *Commissioner,* 52 F. (2d) 372 (C. C. A. 8th), it has been held that not even the rules of a governmental agency, other than those of the Treasury, are controlling for tax

purposes. Furthermore, petitioners' method of handling a given transaction on their books can not, for income tax purposes, give them a status different from that assigned to them by law. *Brown* v. *Helvering,* 291 U. S. 193; *Spring City Co.* v. *Commissioner,* 292 U. S. 182, 189–190.

Petitioners have a heavy burden cast upon them to establish that the Commissioner's action in denying them the use of inventories was not only erroneous but plainly arbitrary. *Lucas* v. *Structural Steel Co.,* 281 U. S. 264; *Finance & Guaranty Co.* v. *Commissioner,* 50 F. (2d) 1061 (C. C. A. 4th); *Hamill* v. *Commissioner,* 30 B. T. A. 955. If it were otherwise, the court would be concerning itself merely with the relative merits of accounting, which, as this Court has said, is not within its province. *Brown* v. *Helvering,* 291 U. S. 193, 204–205. We submit that this burden has not been met merely by showing that the partnership engaged in transactions which, if engaged in by any other person, would be clearly classed as speculation; that is, by showing that it purchased the securities from brokers for resale through brokers at a profit upon an expected rise in the market.

Finally, petitioners rely heavily upon *Commissioner* v. *Stevens,* 78 F. (2d) 713 (C. C. A. 2d), and *Commissioner* v. *Charavay,* 79 F. (2d) 406 (C. C. A. 3d), in support of their contention. Both of these cases involved the transactions of the firm of Stevens & Legg, which dealt in securities as a floor "specialist" on the New York Stock Ex-

change. The Circuit Court of Appeals for the Second Circuit has recently denied the inventory privilege to a floor trader (*Seeley* v. *Helvering,* 77 F. (2d) 323), and the Circuit Court of Appeals for the Third Circuit to a broker who purchased stock for his own account on margin through other brokers (*Hammitt* v. *Commissioner,* 79 F. (2d) 494). While it is true that the functions of a specialist differ from the functions of a floor trader, or the activities of a broker dealing for his own account on margin, it is the Government's contention that the purchases and sales which the specialist makes for his own account in the securities in which he specializes partake of the nature of speculations no less than those of the taxpayers in the *Seeley* and *Hammitt* cases, *supra.* However, for the purposes of the instant case it will be necessary only to point out briefly that specialists have certain relationships with others which petitioners do not have, and hence that the *Stevens* and *Charavay* cases, even if correctly decided,[3] are not authority in petitioners' favor.[4]

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[3] On October 12, 1936, this Court granted the Government's petition for certiorari in a case involving the purchases and sales of a specialist for his own account of securities in which he specializes. *Commissioner* v. *Albert Fried*, Nos. 186 and 187, and assigned the case for argument with the present one. In our brief in that case the Government will present to the Court, in detail, the functions of a specialist which we believe prove that he, too, should be denied the inventory privilege.

[4] While the record discloses that its floor member, Leonard Schafer, was a specialist in two stocks (R. 32), it is en-

The functions of a specialist are two-fold. First, he is a broker's broker. As such he owns no securities, but merely executes orders which other brokers give him for the purchase and sale of the stock in which he specializes. Second, he is a purchaser and seller of the stock in which he specializes for his own account, such purchases and sales being made chiefly in order to create and maintain a close market.[5] The authorities appear further to agree that the purchases and sales of specialists for their own account of the securities in which they specialize resemble the purchases and sales of a floor trader—that is, that in respect thereof, each merely speculates for small profits.[6] Further, as

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tirely silent as to what these were. But it is clear from the findings that these purchases and sales were not made in connection with that phase of the brokerage business which the firm transacted through its floor member as a specialist. Though the petitioners did not question these findings below, they now assert, contrary thereto, as has already been pointed out, that these transactions were an "integral" part of the firm's business (Br. 7).

[5] See *Short-Selling* (1932 Edition), by James Edward Meeker, Economist of the New York Stock Exchange, pp. 32–33; *The Work of the Specialist*, by Dr. G. Wright Hoffmann, being Chapter XII of *The Security Markets—Twentieth Century Fund, Inc.* (1935), p. 407; *Stock Market Theory and Practice* (1932 Edition) by R. W. Schumaker, Financial Editor of Forbes Magazine, p. 34, and the Report of the Securities and Exchange Commission on the Feasibility and Advisability of the Complete Segregation of the Functions of Dealer and Broker, made on June 20, 1936, pursuant to Section 11 (c) of the Securities Exchange Act of 1934, p. 25 *et seq.*

[6] See, for example, *The Work of the New York Stock Exchange* (1930 Edition) Meeker, pp. 83, 211; *The Stock*

pointed out in the Report on the Feasibility and Admissibility of the Complete Segregation of the Functions of Dealer and Broker, issued by the Securities and Exchange Commission in 1936, pages 33–34, the purchases and sales of the specialist may be expected to be of an in-and-out character which tend to balance each other over brief periods, because under ordinary circumstances he is willing to trade either as a buyer or as a seller. Without conceding that specialists are entitled to use inventories, we submit that enough has been said to justify the conclusion that petitioners are not aided by the *Stevens* and *Charavay* cases.

III

THE PRIOR PRACTICE OF THE BUREAU DOES NOT FORECLOSE A DECISION ON THE MERITS

Petitioners contend, in Point III of their brief, that the Bureau practice of prior years, and expressed views on the subject, estop the Commissioner from using any other than the inventory basis. The point was not raised by the petition for certiorari, or by any of the specifications of errors to be urged set out therein, and it is, therefore, not appropriately urged now. *Helvering* v. *Taylor,* 293 U. S. 507, 511; *Gunning* v. *Cooley,* 281 U. S. 90, 98; *Warner Co.* v. *Pier Co.,* 278 U. S. 85, 91. In any event, the point is without merit.

Exchange from Within (1913 Edition), by William Clark Van Antwerp, p. 279; *The Stock Market* (Revised Edition, 1934), by Dr. S. S. Huebner, p. 177.

It is asserted generally that the Bureau approved petitioners' method of reporting in prior years (Br. 25–26). There is no proof of the basis upon which the Bureau acted, or that it had full knowledge of the facts. The one partnership tax return in evidence fails to disclose any information, either as required by the regulations or in answer to specific questions which would reveal the present method. There is no showing that the Commissioner's agents were ever informed of the method, and none as to what representations may have been made to them. Indeed, the record does not furnish an adequate basis for the conclusion that the Commissioner has ever approved the use of inventories for calculating gains and losses upon transactions made by petitioners for their own account. The most that can be claimed is that petitioners have heretofore reported some transactions on an inventory basis which have not been questioned.

But whatever the situation may have been in earlier years, it is now settled that the Commissioner has ample authority to revise an earlier ruling or to decide a question in a later year differently from the way he decided it in an earlier year. *Burnet* v. *Henry,* 283 U. S. 229; *John M. Parker Co.* v. *Commissioner,* 49 F. (2d) 254 (C. C. A. 5th); *Sweets Co. of America* v. *Commissioner,* 40 F. (2d) 436 (C. C. A. 2d); *Laher Auto Spring Co.* v. *United States,* 5 F. Supp. 38 (C. Cls.). Furthermore, the ruling relied on by petitioners is not such as

calls for the invocation of the rule that repeated reenactments of the statute without change warrant the conclusion that Congress has accepted an interpretation given it by the Treasury Department. That rule is applicable only to Treasury Regulations and Treasury Decisions which are formally promulgated by the Commissioner with the approval of the Secretary. *Helvering* v. *New York Trust Co.*, 292 U. S. 455, 467–468.

We submit that the Court of Appeals correctly held (R. 87) that if there was in fact any neglect of the Commissioner in the premises, it can not bind the Government to its prejudice. A similar argument was aptly characterized by the Circuit Court of Appeals for the Second Circuit as makeweight. *Seeley* v. *Helvering*, 77 F. (2d) 323, 324.

CONCLUSION

It is therefore respectfully submitted that the decisions of the court below should be affirmed.

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OCTOBER 1936.